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IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,

Petitioners,

v.

PAUL FELZEN, et al.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF PUBLIC CITIZEN, INC., AND TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1]

Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigating organization. On behalf of its 100,000 members, Public Citizen has worked on issues involving corporate responsibility toward shareholders such as those presented in the suit before this Court. It also believes strongly in the need for class actions to effectively enforce consumer and shareholder rights because individuals acting alone often do not have the means to do so, and it has frequently made use of the class device on behalf of consumers. Public Citizen recognizes, however, that class actions can be abused, to the detriment of the class members. Thus, through its Litigation Group, Public Citizen has represented objectors in approximately 30 nationwide class action settlements in which the named representatives and their attorneys were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent.[2] Public Citizen opposes the result sought by respondents here because it would

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of this Court, *amici* state that no party had any role in writing this brief and that no one other than *amici* made a monetary contribution to its preparation or submission.

[2] *See, e.g., Amchem Prods., Inc. v. Windsor*, 117 S. Ct. 2231 (1997); *In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995); *Bowling v. Pfizer*, 922 F. Supp. 1271 (S.D. Ohio), *aff'd*, 102 F.3d 777 (6th Cir. 1996); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995); *see generally* Reske, "Two Wins for Class Action Objectors," 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing objecting class members).

undermine the ability of objecting class members to appeal the approval of improper class action settlements, thus curtailing an important tool for curbing class action abuse.

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm dedicated to pursuing justice for people harmed by corporate and governmental abuses. TLPJ prosecutes cases throughout the federal and state courts to advance consumers' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. TLPJ believes that class actions are essential and has brought them in many areas ranging from sex discrimination to consumer rights. However, class actions can be abused and turned into a tool for curtailing rights. Thus, TLPJ has established a Class Action Abuse Prevention Project to monitor, expose, and prevent abuses of the class action device. In this capacity, TLPJ often serves as counsel for class members who object to unlawful or unfair class action settlements. *See, e.g., Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W.Va. 1997). TLPJ is concerned that requiring intervention as a condition for appellate standing will restrict the availability of appellate review of class action settlements. This restriction on appellate review, in turn, will increase the potential for unfair, collusive settlements that are not in the best interests of the class.

This case involves the settlement of shareholder derivative suits under Federal Rule of Civil Procedure 23.1, and thus petitioners will focus on the specifics of that Rule. *Amici*, on the other hand, will focus primarily on the settlement process under the closely related class action provisions of Rule 23, where the need for protection of the class, and the dangers of erecting procedural barriers of the kind created by the Seventh

Circuit below, are, if anything, of greater significance.

STATEMENT OF THE CASE

This case arises from a series of shareholder derivative actions brought on behalf of Archer Daniels Midland Company ("ADM"), a large agricultural corporation. Those actions piggybacked on a federal investigation that led to a guilty plea and a $100 million criminal fine paid by ADM for conspiring with its competitors to fix the prices of its agricultural products. The suits alleged that ADM's directors breached their fiduciary duties by failing to oversee the company's operations properly, and they sought recovery on behalf of the company of the $100 million criminal fine, plus $90 million that ADM had paid to settle related civil antitrust suits. *See* Petition at 5.

According to petitioners, plaintiffs' counsel allowed the derivative actions to languish for nearly two years without taking meaningful discovery. *Id.* at 6. Thereafter, a settlement was reached, which simply incorporated alleged corporate reform measures that ADM's directors had already adopted. The only cash component of the settlement—$8 million—went to pay attorney's fees, half for the plaintiffs' lawyers and the other half to pay the future fees to be expended by ADM in its supposed reform efforts. *Id.*

After the settlement was proposed, ADM shareholders were notified of the terms of the settlement and their right to object to it, as required by Federal Rule of Civil Procedure 23.1. Petitioners, two large public pension funds with significant stock holdings in ADM, filed written objections and appeared through counsel at a hearing to determine whether the settlement should be approved, arguing that the settlement provided no real benefits except to the lawyers and thus "sold out" the interests

of the corporation. However, petitioners did not move to intervene in the actions. *See* Petition at 7. The district court approved the settlement, and petitioners appealed.

The Seventh Circuit dismissed the appeal. Although this case involves a derivative action under Rule 23.1, the court began by holding that unnamed class members may not appeal the approval of a Rule 23 class action settlement unless they have intervened in the action. Pet. App. 4a, *Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998). Based largely on that conclusion, the court of appeals then held that shareholders in a derivative action must also have first intervened before they may appeal the approval of a settlement. *Id.* at 875-76. Because petitioners had not moved to intervene, the court dismissed the appeal. In reaching that result, the Seventh Circuit panel overruled four of its prior decisions, claiming reliance on the intervening ruling of this Court in *Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam).

SUMMARY OF ARGUMENT

A. As the Seventh Circuit's decision recognized, the question of appealability in the Rule 23 context is closely related to appealability in a Rule 23.1 derivative action, and thus it is likely that the decision of this Court will answer the Rule 23 issue as well. *See* Petition at 12 n.10. But there is a difference between the two issues. As petitioners' question presented acknowledges, shareholders who object to a settlement in a derivative action are not, technically speaking, "parties" to the action, which is brought on behalf of the corporation. The shareholders do, however, have a direct interest in the action, since the suit seeks to recover assets for a corporation that they, in part, own. That is precisely why Rule 23.1 requires that shareholders be notified of the settlement of any derivative

action and why they are given the right to object to the settlement. Thus, we fully agree with petitioners that shareholders are "privies" to the plaintiffs in a derivative action and that requiring them to intervene before they may appeal is contrary to Rule 23.1 and common-law practice, and would undermine the efforts of shareholders to monitor derivative litigation. Petition at 17-23.

Unnamed class members in a Rule 23 class action do not face the same technical problem as that faced by Rule 23.1 shareholders, and thus, as applied to them, the intervention requirement is even more inappropriate. Unnamed class members need not intervene because, in key respects, they are *already* parties to the action by virtue of their class membership. Although unnamed class members are treated differently from named plaintiffs for some purposes, *see* H. Newberg & A. Conte, 1 *Newberg on Class Actions* § 1.04 (3d ed. 1992), they are treated as parties in many respects, for example, for statute of limitations purposes, *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 551 (1974), and for determining subject matter jurisdiction. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973). Most importantly, class members are treated as parties insofar as their claims are released by a properly approved class settlement. Thus, it is illogical and unfair to require class members to intervene in order to appeal from a class action settlement, when, with respect to its most significant practical consequence—its binding effect—they are already parties to the action. *See Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

B. An intervention requirement would undermine the role of objectors in assuring fair and non-collusive class action settlements. Some courts have suggested that allowing absent

class members or shareholders in a derivative action to appeal would create intolerable inefficiency, and that, therefore, intervention should be allowed only where the objecting class member can show that the named plaintiffs are not adequate class representatives. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457 (7th Cir. 1997). That standard makes no sense because a class action settlement is subject to challenge for a host of reasons unrelated to the class representatives' adequacy, including that its benefits are not sufficient. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768, 804-18 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995); H. Newberg & A. Conte, 2 *Newberg on Class Actions* § 11.58 (3d ed. 1992) (detailing wide range of types of objections). Therefore, an adequacy of representation standard would effectively insulate many class settlements from appellate review and create an atmosphere in which unfair or collusive class action settlements could flourish.

C. An intervention requirement would also harm class members by creating a trap for the unwary. When class actions are settled, notice and an opportunity to object is provided to the absent class members who, generally speaking, do not have lawyers. Requiring such *pro se* class members to intervene under Rule 24 would likely cut off their rights to appeal because they would probably not know of such a requirement and, even if they did, they would not know how to comply with it. Moreover, requiring formal intervention adds nothing to the process, which already requires objectors to state their particular objections before the district court and only those objections can be raised on appeal.

ARGUMENT

INTERVENTION IS NOT REQUIRED BEFORE AN APPEAL MAY BE TAKEN FROM A SETTLEMENT APPROVED UNDER RULES 23 AND 23.1

A. The Decisions That Inspired Adoption Of The Intervention Requirement — *Marino* And *Guthrie* — Do Not Support An Intervention Requirement For Class Members Who Timely File Objections To Class Action Settlements.

A body of case law holds that an absent class member does not have "standing" to appeal a district court's approval of a class action settlement unless he or she has intervened under Federal Rule of Civil Procedure 24. *See, e.g., Shults v. Champion Int'l Corp.*, 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993); *Walker v. City of Mesquite*, 858 F.2d 1071 (5th Cir. 1988). Two cases—*Marino v. Ortiz*, 484 U.S. 301 (1988) (per curiam), and *Guthrie v. Eva...*, 815 F.2d 626 (11th Cir. 1987)—have led to this development. As we now show, the actual holdings and rationales of *Marino* and *Guthrie* do not support an intervention requirement.

1. *Marino v. Ortiz* Provides No Support For Respondents.

In *Marino*, a class consisting of black and Hispanic police officers sued the New York Police Department under Title VII of the Civil Rights Act, alleging that a police sergeant's examination was discriminatory. Thereafter, the case settled, and a group of white police officers, who were not class

members and who had not sought to intervene, appeared at the final fairness hearing on the settlement and presented their objections to the settlement. The district court approved the settlement, and the group of whites appealed. On appeal, the Second Circuit affirmed, not on the merits of the settlement, but on the ground that the appellants were not parties to the action.

This Court affirmed in a three-paragraph per curiam opinion. The non-intervening white officers' appeal could not be maintained, the Court held, under the "well settled" principle "that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment." *Marino*, 484 U.S. at 304. Responding to the Second Circuit's suggestion that there might be some exception to this general principle, the Court disagreed, noting that "the better practice is for such a *nonparty* to seek intervention for purposes of appeal." *Id.* (emphasis added).

Marino does not support imposing an intervention requirement on class members who object to a class action settlement. The white police officers were not members of the class of black and Hispanic officers who had sued the police department, and they did not move to intervene. It was those key facts—that the appellants were not class members and they had not sought party status through intervention—that led this Court to affirm the dismissal of the appeal, leaving the implication that, had the appellants been class members, no intervention would have been necessary. Indeed, if, under *Marino*, even class members must seek intervention in order to appeal, as the court below held, Pet. App. 3a, *Felzen*, 134 F.3d at 875, the Court's contrasting depiction of the black and Hispanic *plaintiff* class members with the *non-party* white officers would have been superfluous. *Marino*, 484 U.S. at 303. Thus, if anything, *Marino* supports our view that absent class

members are already "parties" who need not intervene to appeal from approval of a class action settlement that directly affects their own rights by barring future suits on the claims covered by the settlement.

In imposing an intervention requirement, the lower courts have ignored *Marino*'s facts and adopted the following syllogism: Absent class members are "non-parties" and *Marino* requires intervention for "non-parties" before they may appeal. *Croydon Assocs. v. Alleco, Inc.*, 969 F.2d 675, 679 (8th Cir. 1992), *cert. denied*, 507 U.S. 908 (1992); *Walker*, 858 F.2d at 1074. But the premise of that syllogism is wrong. Although the rights and obligations of named plaintiffs and of unnamed plaintiff class members differ in some important respects, decisions of this Court and other authorities demonstrate that both named and unnamed plaintiffs are "parties" for all purposes relevant to whether intervention is a precondition for appellate standing.

For instance, in holding that class members' statutes of limitations, like those of the named plaintiffs, are tolled during the pendency of a class action, this Court relied on the fact that absent class members are "parties to the suit." *American Pipe and Construction Co. v. Utah*, 414 U.S. 538, 551 (1974). Moreover, the claims of non-named plaintiffs, like those of named plaintiffs, must meet the requisite jurisdictional amount in diversity cases under 28 U.S.C. 1332. *Zahn v. International Paper Co.*, 414 U.S. 291 (1973).

In addition, the role that absent class members play as objectors to class settlements is based on the fact that they have a direct interest in the claims asserted in the litigation, which are assumed to be equal in stature to those of the named plaintiffs. Thus, they are given notice of the settlement and they must

come forward to assert their rights, or they will be foreclosed from doing so in the future. *See* Fed. R. Civ. P. 23(e); *Manual on Complex Litigation Third*, § 30.41, at 236-38 (Federal Judicial Center 1995) (hereafter "Manual"). On the other hand, by definition, under Rule 24(a), non-parties who seek intervention do *not* have rights at stake in the suit that can be legally affected by the situation. Instead, they must prove their interest in the controversy before they achieve party status. *See* Fed. R. Civ. P. 24(a).

Furthermore, absent class members are often allowed discovery into the justification for a class settlement, precisely because of their undisputed interest in the litigation. H. Newberg & A. Conte, 2 *Newberg on Class Actions* § 11.57 (3d ed. 1992); *see, e.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1126 (7th Cir.), *cert. denied*, 444 U.S. 870 (1979). Since under the Federal Rules of Civil Procedure, discovery may be obtained only by parties to the action, or those expecting to become parties, Fed. R. Civ. P. 27, it is clear that the courts view absent class members as parties for discovery purposes. *See* Fed. R. Civ. P. 26(b)(1) ("*Parties* may obtain discovery" regarding relevant, non-privileged matters), Fed. R. Civ. P. 33 ("*any party* may serve upon any other party written interrogatories"), Fed. R. Civ. P. 34 ("*Any party* may serve upon any other party" document requests).

Most fundamentally, an absent class member is a party for *res judicata* purposes. Thus, a judgment approving a class action settlement has binding effect on that class member, even if the judgment is entered in a court on the other side of the continent with which the class member has no contact, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985), and even if the judgment releases the class member's claims and potential claims on a far-reaching, global basis. *See Matsushita Elec.*

Indus. Co. v. Epstein, 516 U.S. 367 (1996). To be sure, because the vicarious nature of class representation raises concerns not present in traditional bi-polar litigation, absent class members may only be bound to a judgment after minimal due process safeguards—such as notice, adequate representation, and opt-out rights—are provided. *Shutts*, 472 U.S. at 812. But if those procedures are followed, the absent class members have had their "day in court," *Martin v. Wilks*, 490 U.S. 755, 762 (1989), and the judgment binds them as "parties" just as assuredly as it does the named plaintiffs. Conversely, non-class members, such as the white police officers in *Marino*, would not be bound by a settlement, precisely because they are not parties to the litigation. *See id.* at 762-65. Accordingly, it is unfair and illogical to require class members to surmount the additional burden of intervention when they seek to protect their rights by appealing an adverse judgment.

2. *Guthrie* Is Factually Distinguishable And Wrongly Decided.

The other key decision leading to widespread adoption of the intervention rule—*Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987)—involves very different facts from those involved in class action settlements, and thus does not support an intervention requirement. In addition, as explained below, *Guthrie*'s policy justifications for the intervention rule do not survive analysis.

Guthrie was a suit challenging conditions at a state prison. After 13 years of contested litigation, the district court issued a permanent injunction prohibiting the defendants from violating prior court orders. An inmate-class member who, so far as the opinion reveals, never participated in the district court proceedings, appealed the injunction. *Id.* at 627. The Eleventh

Circuit dismissed the appeal, holding that an unnamed individual class member does not have standing to appeal a final class action judgment. Although the court's holding was stated in broad terms, *Guthrie* suggested that the right to appeal might be treated differently "when there is disagreement among members of the class on settlements." *Id.* Unfortunately, cases following *Guthrie* and overlooked the fact that *Guthrie* was a litigated, not a settled, case. *See, e.g., Walker*, 858 F.2d at 678; *Croydon Assocs.*, 969 F.2d at 1073.

Whether and by what means an unnamed plaintiff who objects to a class action settlement may appeal is quite different from whether, as in *Guthrie*, a class member may appeal after a class action has been litigated to judgment. In the litigation situation, an unnamed class member generally has been notified of the action prior to trial, *see* Fed. R. Civ. P. 23(c)(2), (d), and, usually, as apparently was the case in *Guthrie*, has not asserted her rights at any time prior to judgment. Thus, the *Guthrie*-type absentee has given neither the court nor the other parties notice of her intent to appear, of what arguments she might raise, or of how her interests differ from those of the named plaintiffs. Whether described as lack of appellate "standing," *Guthrie*, 815 F.2d at 627, or as a failure to intervene and object below, the essential problem is one of unfair surprise, and thus is akin to the ordinary prohibition against raising on appeal issues that have not been raised in the district court.

The situation presented by class action settlements is altogether different from that presented by *Guthrie*. In the settlement context, absent class members respond to a notice required by the Federal Rules. *See* Fed. R. Civ. P. 23(e), 23.1. The very purpose of the notice is to call forth objections and to assure that the court is presented with arguments that expose the potential pitfalls, as well as the benefits, of the settlement by

persons who have an undisputed interest in the case. Manual, § 30.41, at 237. As occurred in the settlement of the derivative actions here, this notice is generally the first time that the class members learn of the action. *See id.* (in settlement class actions, notice of pendency of action and of settlement is simultaneous). Among other things, the class members (or the shareholders in a derivative action) are told that they may file objections to the settlement by a specific date, and appear in person at a district court hearing to determine whether the settlement should be approved as fair, adequate, and reasonable. *See id.* § 41.43, at 488 (model class action settlement notice). To our knowledge, such notices never mention a need for intervention. If the objectors do not persuade the district court, at least they will have alerted the settling parties and the court of their specific positions on the matter, and thus an appeal surely will not come as a surprise.

Thus, *Guthrie*'s facts are a far cry from the facts here or in settlement class actions generally. Nonetheless, other courts have relied on the policy rationales offered by *Guthrie* to support imposition of a broad intervention requirement. As we now show, none of those rationales withstands scrutiny.

a. *First, Guthrie* asserted that because the class member who sought to upset the district court's injunction had not obtained a finding from the district court that he would adequately protect the interests of the class, he "clearly has no standing to take any action on behalf of the class." 815 F.2d at 628. That rationale is a non-sequitur, at least as it applies to challenges to class action settlements.

Before a class can be certified and a settlement approved, named plaintiffs and their counsel must be found to be adequate representatives under Rule 23(a)(4). *See Amchem*

Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2250-51 (1997). But that has nothing to do with the role of an objector, who claims not to represent the class but that the settlement is unfair to him (and to others similarly situated). Indeed, objectors often maintain that the named representatives are inadequate, or that *no one* is an adequate representative because of inherent class conflicts, as this Court held just two Terms ago, when it rejected the *Amchem* class action settlement involving a "sprawling" class of millions of people exposed to asbestos. *Id.* at 2250. Further, this argument is not a reason to deny an objector standing to appeal, since, if an objector were required to show that he were an adequate class representative, that would generally bar not only an appeal of the settlement's approval, but any challenge to the fairness of the settlement in the district court as well.

b. *Second*, *Guthrie* and its progeny have denied objectors the right to appeal on the ground that objectors have alternative avenues for relief. 815 F.2d at 628; *see also, e.g.*, *Walker*, 858 F.2d at 1073-74. These courts have relied principally on the right of class members to seek intervention, but that only begs the question presented: whether such intervention is necessary where, as here, the objecting class member has timely appeared in the district court and has put the settling parties on notice of her particular objections.

Guthrie also suggested that collateral attack—the filing of a separate, post-judgment lawsuit attacking the validity of the settlement—is a viable alternative to appeal. 815 F.2d at 628. But that approach is unfair to class members and undermines the interests of the litigants and the courts in finality. Under the law of judgments, an absent class member would be entitled to collaterally attack a judgment approving a class action settlement where due process was the basis of the attack, *see*

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 398-99 (1996) (Ginsburg, J., concurring in part and dissenting in part); *cf. Hansberry v. Lee*, 311 U.S. 32 (1940); however, that tool would not be available to challenge the fairness of the settlement or other legal impediments that generally can be contested on direct review. *See, e.g., Amchem*, 117 S. Ct. at 2249-51 (rejecting settlement class action for failure to meet Rule 23 certification criteria). That being the case, a collateral attack is a poor substitute for a direct appeal that can protect all of the absentees' legal interests. *See generally* Kahan & Silberman, *The Inadequate Search for 'Adequacy' in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. Rev. 765, 780 & n.69 (1998) (hailing superiority of comprehensive direct review over collateral attack and criticizing intervention requirement as potential impediment to appellate review). Moreover, regardless of the scope of collateral attack, it is generally preferable to have challenges to a class action settlement heard in the original forum, with direct appellate review, rather than to encourage each class member to file a separate suit, in a distant forum, challenging the *res judicata* effect of a previously-entered class action judgment.

Guthrie also suggested that because class members have the right to opt out of damages actions certified under Rule 23(b)(3), they do not need appellate review of class action settlements to which they object. 815 F.2d at 628; *see* Fed. R. Civ. P. 23(c)(2). That rationale does not help respondents here, because, in Rule 23.1 derivative actions, there is no right to opt out. More importantly, even in Rule 23(b)(3) cases, the courts have recognized that the right to opt-out is often illusory, because the claims of individual class members are not sufficiently large to support separate litigation. *See, e.g., In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d at 1136. Indeed, because one of the principal purposes of Rule

23(b)(3) is to allow the aggregation of relatively small claims, it is no answer to say that absent class members who want to appeal approval of a class action settlement could have opted out.

This "love it or leave it" approach to Rule 23 is also at odds with the structure of the Rule, which demands that (b)(3) classes meet the certification criteria, including adequacy of representation, that class members be given opt-out rights, *and* that there be notice and court approval before a settlement can be imposed on class members. Fed. R. Civ. P. 23(a)(4), (c)(2), (e). This reading of the Rule—that its commands are consecutive, not alternative—is confirmed by the logic of *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156 (1974), where the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2) because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," the Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *See also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, the right to opt out does not diminish the class members' rights to object to a settlement before the district court and to appeal from an adverse ruling if the settlement is approved.

c. *Third*, and finally, *Guthrie* and its progeny assert that "denying the right to appeal" is necessary to maintain the efficiency of class litigation. *Guthrie*, 815 F.2d at 629; *see also, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456, 457-58 (7th Cir. 1997). That argument has some force in cases like *Guthrie* that were litigated, but it makes no sense to argue that it is necessary to squelch opposition to class

action settlements because of the concern that they might be overturned, requiring the once-settled case to return to the litigation mode. *See id.* At bottom, this argument proves too much. It would always be expedient to deny class members the right to challenge a class action settlement—in the district court as well as on appeal—but that result would fly in the face of Rule 23 and due process. *See Shutts*, 472 U.S. at 812 (enumerating due process prerequisites to obtain judgment that binds absent class members). In sum, there is no basis to circumscribe an unnamed class member's right to appeal.

B. The Intervention Requirement Undermines The Role of Objectors In Assuring Fair And Non-Collusive Class Action Settlements.

The courts that require class members to intervene have taken two general approaches to the standards by which a motion to intervene will be judged. Some courts suggest that intervention will be granted as a matter of course, *see, e.g., Shults*, 35 F.3d at 1061, and others suggest that intervention will be granted only to class members who can prove that the class representatives are inadequate. *See, e.g., Guthrie*, 815 F.2d at 628.

1. Under the first approach, it is assumed that unnamed class members who are aware of the intervention requirement will file papers explaining the obvious fact that their interests are at odds with those of the settling parties and that they desire intervention solely to protect their appellate standing. *Cf. Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 & n.10 (1972) (requirement for intervention as of right under Rule 24(a) is met where representation "may be" inadequate, and "burden of making that showing should be treated as minimal") (citation omitted). If that is the operating

assumption, the district judge will be hard pressed not to grant intervention, since to do otherwise would be tantamount to denying the objector's right to appeal. Under this view of the intervention requirement, a Rule 24 motion is little more than additional work for both litigants and judges, with no countervailing benefit, and a potential trap for unwary objectors, particularly *pro se* objectors, who may not know of the need to intervene. *See infra* Part C (discussing burden on *pro se* class members); *see also* Duffy, *The Appealability of Class Action Settlements by Unnamed Parties*, 60 Univ. Chi. L. Rev. 933, 954 (1993) (intervention requirement "produces more work for the district court (a formal motion in addition to the settlement hearing), no savings of time for the appellate court (in both cases it has conducted an appeal) and results in no review of the much more basic issue (the fairness and reasonableness of the settlement) by either court").

Nonetheless, if this Court decides that there is such a requirement, we believe that treating intervention as a formality follows *a fortiori* from *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 392-96 (1977). In that case, the question was whether unnamed class members should be permitted to intervene *after judgment* solely for the purpose of appealing an order denying class certification, which the named plaintiffs had decided not to appeal. If intervention had been denied, the individual absent class members would not have been bound by the judgment, since it did not extend to the merits, but only prevented the named plaintiffs from representing the class. Nonetheless, the Court held that the lower court's denial of intervention was erroneous *as a matter of law*, noting that the defendant was in the same situation regardless of whether the appeal was brought by an unnamed plaintiff rather than by one of the named plaintiffs. *United Airlines*, 432 U.S. at 394; *see also Alaska v. Suburban Propane Gas Corp.*, 123 F.3d 1317

(9th Cir. 1997) (overruling district court's denial of unnamed class member's request to intervene solely for the purpose of appeal). The consequence of denial of intervention is far more severe here than was the case in *United Airlines*. If intervention is denied to a class member seeking to appeal from a settlement, that class member *is* bound by a judgment on the merits. Thus, if intervention is a precondition for appellate standing, it should, under *United Airlines*, be granted as a matter of course to all objectors who have filed timely objections in the district court.

2. The second strain of case law regarding the standard for intervention is of much more concern to *amici* because it strongly implies that class members' rights to appeal will be greatly circumscribed. In *Guthrie*, for instance, the Eleventh Circuit noted, albeit not in the context of a settled case, that "[i]f each class member could appeal individually, the litigation would become unwieldy. Thus, allowing direct appeals by individual class members who have not intervened in the district court would defeat the very purpose of class action lawsuits." 815 F.2d at 629. The court of appeals below made the same point in the settlement context, Pet. App. 4a, *Felzen*, 134 F.3d at 875, relying on its earlier ruling in *Brand Name Prescription Drugs*, which concluded that allowing class members "to appeal would be an ... affront to intelligent judicial administration because it would fragment control of the class action." 115 F.3d at 457.

Although no case of which we are aware sets forth a precise standard by which intervention will be judged, some cases imply that class members will be denied intervention unless they can show that the certified class representative does not adequately represent the interests of the class. *Id.* at 457-58; *Guthrie*, 815 F.2d at 628. Thus, without any basis in Rule 23 or 28 U.S.C. 1291, which provides litigants an appeal as of right

from final decisions in civil cases, the district court would become the court of appeals' gatekeeper. Under that standard, the district court, having already approved the class settlement and, thus, by definition, having found that the class representatives were adequate, *see* Fed. R. Civ. P. 23(a)(4), would almost surely deny intervention. *See, e.g., Wade v. Goldschmidt*, 673 F.2d 182, 186 n.7 (7th Cir. 1982) (an applicant for intervention fails to meet burden of demonstrating inadequate representation "when no collusion is shown between the representative and an opposing party"). At that juncture, the class member would be required to appeal both from approval of the settlement and the denial of intervention, subject, presumably, to abuse of discretion review, which would likely be a difficult standard to meet in the intervention context. *See, e.g., Bradley v. Milliken*, 828 F.2d 1186, 1194 (6th Cir. 1987).

This approach to intervention is seriously mistaken for three related reasons. First, it would effectively reduce the merits of the class settlement to one issue—adequacy of representation, *see* Fed. R. Civ. P. 23(a)(4)—although there are many other legitimate bases for overturning a class settlement or its fees component. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Litig.*, 55 F.3d 768 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) (settlement's benefits not fair exchange for release of class members' claims); *Bowling v. Pfizer, Inc.*, 132 F.3d 1147 (6th Cir. 1998) (excessive attorney's fees).

Second, such an approach takes intervention under Rule 24 well beyond its proper context. As our discussion of *Marino* indicates (*supra* at 7-11), intervention is designed to permit *non-parties* to *litigate* an already-pending case under certain circumstances. Generally speaking, such non-parties do not have to be notified of the pendency of an action, and they are not bound by a judgment in that action. *Martin v. Wilks*, 490

U.S. at 762-65. Assuming that they do learn of the case, potential intervenors must file a motion to intervene, along with a "complaint in intervention," setting out the claims that they believe are not being adequately advanced by the named plaintiffs, or a defensive pleading "setting forth the ... defense for which intervention is sought." Fed. R. Civ. P. 24(c). The court then decides whether the non-party has a sufficient interest in the litigation to be granted party status. Fed. R. Civ. P. 24(a), (b).

In the class action settlement context, however, no one disputes that the absent class members *already* have legitimate interests in the litigation and that they will be bound by the class judgment. *See Matsushita*, 516 U.S. 367; *Shutts*, 472 U.S. at 812. Indeed, by definition, absent class members must hold the same claims as the named plaintiffs. *See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 156 (1982); *see* Fed. R. Civ. P. 23(a)(2), (3). And it cannot seriously be argued that the class representatives who support the settlement adequately represent the interests of class members who oppose it. Here, for instance, the shareholders who instituted the suit on behalf of ADM support the settlement and as do their counsel, whose multi-million dollar fee hinges on its approval; on the other hand, the objecting shareholders maintain that the settlement, including its fees component, was a collusive "sell out" of the corporation's interests. *See* Petition at 5-7. Thus, because the adversity of interests between settlement supporters and settlement objectors is clear and irreparable, it makes no sense to put objectors through the Rule 24 process.

Third, and most important, imposing an "adequacy of representation" standard for intervention would bar effective appellate review of many class action settlements. Class actions are enormously useful tools for justice, because they provide

relief to large number of individuals who do not have the means to sue on their own. But class actions can be abused, largely because "the [class] lawyers might urge a class settlement at a low figure or on a less-than-optimal basis in exchange for red-carpet treatment for fees." *Weinberger v. Great Northern Nekoosa Corp.*, 925 F.2d 518, 524 (1st Cir. 1991). Although we take no position on the ultimate merit of the settlement before the Court, some of the facts—counsel's less-than-vigorous prosecution of the suit, the small monetary recovery, and counsel's gargantuan fee (Petition at 6-7)—raise considerable suspicion. In any event, the ever-present potential for collusion in itself favors an approach under which appellate review of class action settlements will remain robust.

Moreover, other dynamics of the settlement process in the district court counsel against any procedural hurdles that might frustrate appellate consideration of the merits. Once a class action settlement is reached, the district court's first action is usually to grant "preliminary approval," which is a finding that the settlement contains no obvious substantive or procedural defects. Manual § 30.41, at 237. After preliminary approval, the settling parties (usually the defendants) expend a considerable sum notifying the class of the settlement. Thereafter, the same district judge who preliminarily approved the settlement presides over a "fairness hearing" and decides whether to give final approval under Rule 23(e). *See id.* §§ 30.41-.42. Given the expense of mounting objections and the complexity of many settlements, the settlement may be viewed by class members as a "fait accompli." *Mars Steel Corp. v. Continental Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 681 (7th Cir. 1987).

Not surprisingly, this process can create a hydraulic pressure for approval by the district courts, a view that is borne

out by the fact that the vast majority of settlements are approved without alteration. *See Empirical Study of Class Actions in Four Federal District Courts* 58 (Federal Judicial Center 1996) ("Approximately 90% or more of the proposed [class] settlements were approved without changes in each of the four districts"); *see generally* Koniak & Cohen, *Under Cloak of Settlement*, 82 U. Va. L. Rev. 1051, 1104-08 (1996) (recounting same phenomenon and describing motivations for district courts to approve class settlements). Under these circumstances, appellate review provides a critical bulwark against hastily approved, potentially unfair settlements. And if the settling parties are able to avoid an appeal on the merits by convincing the district judge that the objectors do not deserve to be intervenors, they may, in effect, give the district court the last word on settlement approval.

This Court's recent decision in *Amchem Products v. Windsor* was possible only because three small groups of objectors, 117 S. Ct. at 2241 n.7, had appealed the approval of the settlement to the Third Circuit, which conducted a comprehensive review of the merits. *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996). *Amchem* not only set an important precedent on the applicability of Rule 23's certification criteria to settlement classes, 117 S. Ct. at 2248-49, but it overturned a settlement that had profoundly harmful effects on segments of the class whose interests had been sacrificed at the expense of those whom the settlement favored. *Id.* at 2250-52; *see generally* Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995). Other appellate decisions that have benefitted class members by rejecting unfair settlements and have contributed to the development of class action jurisprudence were possible only through the efforts of objecting class members. *See, e.g., General Motors*, 55 F.3d 768

(landmark decision regarding parameters of settlement class actions and attorney's fees).

In sum, an intervention requirement jeopardizes merits review of class action settlements. Although that outcome is championed by the court of appeals below in the name of efficiency, Pet. App. 4a-6a, *Felzen*, 134 F.3d at 874-75, such a rule would come at a very heavy price: frustration of rigorous appellate review, and thus greater potential for unfair and collusive class action settlements.

C. Requiring Intervention Is A Trap For Unwary Class Members.

Petitioners argue that, even if this Court agrees with respondents on the intervention issue, the ruling below was so drastic a departure from prior circuit law that it should be applied prospectively only. We agree with petitioners that retroactive application of the Seventh Circuit's ruling would be unfair, but, in our view, the debate over retroactive versus prospective application simply underscores the Seventh Circuit's error regarding intervention, which would impose a trap for unwary objeetors even after it were established law.

If this Court were to rule that intervention is required to appeal settlement approvals under both Rules 23 and 23.1, the likelihood that an objecting class member will neglect to seek intervention will diminish, but it will by no means evaporate. When a class action is settled, notice is sent out to class members who, in the main, are not represented by counsel. The notice informs the class members of the nature of the litigation, the terms of the settlement, and where and when they must file their objections. Manual, § 30.41, at 237. In short, at the settlement stage of modern class actions, thousands of litigants

are invited to participate on a *pro se* basis.

Even if we assume that a class member represented by counsel should know of the need to intervene, imposing that requirement on a *pro se* objector is at odds with reality. A layperson will not be aware of the niceties of federal procedure under Rule 24, and, thus, to condition the right to appeal on such knowledge would be illogical and unfair. To be sure, the standard class action notice could be amended to inform class members of the need to intervene to preserve their appellate rights, *see* Manual, § 41.43, at 488, but there is no reason to believe that non-lawyers would understand what intervention means or what a motion to intervene should contain. As long as a class member-objector files timely objections that focus the district court's attention on the settlement's alleged shortcomings, there is no basis for imposing an additional procedural requirement that jeopardizes the opportunity for appellate review on the merits for all objecting class members, especially for those who were not represented by counsel in the district court.

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed.

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